LCRO 159/09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2
BETWEEN	**MR ALLOA** of Wellington Applicant
And	**MR ULLAPOOL** of Auckland Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Background

[1] Mr Alloa (the Applicant) is the sole director and shareholder of a company that owns a residential rental property in Wellington. R, a lawyer, became the owner of the property next door to the Applicant's property, and they became involved in a protracted dispute concerning a deck that the Applicant intended to build on his rental property. The respondent is Mr Ullapool (the Practitioner) who represented R at a later stage when R decided to issue proceedings against his vendor in which the Applicant was involved.

[2] The Applicant had initially established with the local authority that he did not need a resource consent for his proposed deck, and his building consent was approved. This process occurred, or was at least well advanced before R purchased the property next door. R, acting for himself, filed proceedings in the Environment Court objecting on various grounds to the deck. The specifics are not relevant. The Environment Court decision seems to have found to some degree in favour of R, but the overall effect was that the Applicant was still able to build the deck, with some modifications. R appealed to the High Court, and the Applicant and the local council

cross-appealed. The High Court dismissed both appeals. The end result was that the Applicant could proceed to build his deck.

[3] The Practitioner's involvement arose in relation to a dispute between R and the vendor of the property he had purchased and the real estate agent. R had alleged a breach of warranty under the agreement, misrepresentation and a breach of the Fair Trading Act 1986 (FTA) in relation to what he was or was not told by the vendor and the agent about the deck on the Applicant's property. R issued proceedings for damages. The Practitioner acted for him in relation to these proceedings (the FTA proceedings). I note the Practitioner did not act in the Environment Court or High Court proceedings.

[4] The Practitioner wrote at least two letters to the Applicant, the first dated [date A] and the second dated [Letter B - 8 days later]. In the first letter the Practitioner told the Applicant that, in relation to the FTA proceedings, because the vendor maintained he had made certain representations to her, he would be required to give evidence, and could be summonsed for that purpose.

[5] The second letter [letter B] became the subject of the Applicant's complaint to the New Zealand Law Society. In this letter the Practitioner informed the Applicant that he could face potential liability as a party for the losses claimed by R. The Practitioner enclosed a draft amended statement of claim showing the Applicant and his company named as defendants and suggested he may want to take legal advice on this. The Practitioner continued, and with reference to the deck (paragraph 3 of the 21 October letter) he stated his client had seen the latest plans, which appeared to show a larger structure and noted it would be for the Council to determine whether the design was a permitted activity. In paragraph 4 the Practitioner stated, on a 'without prejudice' basis, that his clients were prepared to agree to the original deck design with certain provisos. He then states: *"not only will this save you considerable expense, it would seem to remove the likelihood that you will be joined as a defendant to this litigation*."

[6] The Applicant made a complaint to the New Zealand Law Society about the Practitioner, alleging that the letter of [letter B letter] was a breach of rule 2.3 of the Lawyers' Conduct and Client Care Rules. This rule provides that a lawyer must use legal processes only for proper purposes.

[7] I should at this point note that the Applicant had also made complaints to the New Zealand Law Society about R and the law firm that employs him. The Standards Committee determined in relation to both these complaints to take no further action. The reason in relation to R was that, because he was acting for himself he was not providing regulated services under the Lawyers and Conveyancers Act 2006 (the Act) and accordingly the Standards Committee did not have jurisdiction to determine the complaint. The reason in relation to the law firm was that the Act applies to lawyers and incorporated law firms only, and that as the firm was neither (it is an unincorporated firm), the Standards Committee had no jurisdiction to consider a complaint against the firm. The Legal Complaints Review Officer, upon applications for review, found that the Standards Committee's determination in each case was correct.

[8] The Standards Committee, in relation to the complaint against the Practitioner, also determined that it should take no further action. The reason given for this was the Committee was of the view that the Practitioner had not acted improperly. It stated:

> "*His conduct in relation to the witness summons and the likelihood of joinder were not threats; the letters were a correct statement of the law and an indication to* (the Applicant) *of the consequences of any refusal to provide evidence. The validity of any application for joinder is a matter for a court to rule on, not a Standards Committee.*"

[9] The Applicant's application for review of that decision in essence alleges that the Standards Committee has misconstrued his complaint. I acknowledge, from a review of the correspondence relating to this matter, that the Applicant has consistently said that his complaint was not about being required to give evidence, nor was it about the prospect of being joined to the FTA proceedings (although he has maintained, based on his own legal advice, that he had no liability and there was no proper basis to claim he did have). His complaint against the Practitioner is spelt out clearly in the application for review, and for the avoidance of any doubt about the matter I set out the relevant part:

> *"…the Standards Committee's interpretation of the* (Practitioner's) *letter dated [letter B] seems to have stopped at paragraph two and have missed* ***the fourth paragraph of the letter which introduces an irrelevant point (the size of my lawful deck) to the current***

> ***District Court proceedings which is a breach of warranty against the vendor and estate agent and invites me to reduce it and then I will be removed from the litigation.*** *My lawful entitlement of the deck was already determined by the Environment Court in [date] under the Resource Management Act and* [the Practitioner] *was not involved in it in any form and that the two matters are completely unrelated to each other.*" (Emphasis in the original).

He alleged that he was effectively threatened with being joined to the FTA proceedings unless he agreed to reduce the size of a deck he was lawfully able to build.

[10] I am satisfied, notwithstanding the finding of no threat by the Standards Committee, that any fair reading of paragraph four of the letter of [letter B] has the meaning that the Applicant attributes to it. The issue that I must determine is whether that is a breach of rule 2.3. This rule provides that:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[11] The Practitioner's response to the complaint focused on his assertion that it was perfectly proper for him to alert the Applicant to the witness summons and joinder issues, and in relation to joinder, it was open to his client to bring a claim against the Applicant pursuant to sections 9 and 43 FTA and Rule 76(3) of the District Court Rules. The Standards Committee, as noted above, said it was up to a Court to decide the joinder issue, not the Committee. I find the Standards Committee has misconceived the issue. The issue to determine is the motive behind the letter and not strictly the question of the tenability of the potential joinder. The Practitioner is right in saying that the mere fact of proceedings being struck out does not of itself determine whether a proper purpose existed for the proceedings in the first place; proceedings are struck out all the time. However, the issue of the tenability of the potential FTA claim against the Applicant may be a factor to weigh in deciding whether rule 2.3 has been breached.

[12] The Standards Committee thus, appears to have determined the matter solely on the basis that the Practitioner had not acted improperly because it found the letter in

relation to the witness summons and the likelihood of joinder were not threats. However, to say the matter of any application for joinder was for the Court to rule on is helpful only in as far as the determination of any actual joinder and subsequent application for strike out would be concerned. To the extent that the Standards Committee found no improper conduct merely because a Court had not determined the tenability of joinder question, I find to be wrong. The real issue is the purpose of the letter and the threatened (for want of a better word) FTA proceedings. The determination of this does not hinge solely on what a Court would decide and I am satisfied it was within the Standards Committee's jurisdiction. It is therefore also proper for me inquire into the tenability of the proposed FTA action in relation to rule 2.3, but bearing in mind particularly that it was a proposed claim that was never filed and remains hypothetical and no evidence has been put before a decision maker with jurisdiction to determine it.

[13] The basis for the proposed FTA action against the Applicant was an allegation about inconsistency between his evidence given in the Environment Court and allegations by the vendor in the FTA proceedings about what he told her about the deck. Section 43 FTA allows a Court to make remedial orders on the application of any person if it finds that any person has suffered loss or damage because of another's prohibited conduct. Prohibited conduct includes contravening section 9 FTA. Remedies include ordering the offender to pay compensation to the person who has suffered loss or damage. A prerequisite is a finding that loss or damage has occurred or is likely to occur.

[14] Section 9 FTA provides that no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. The line of argument by the Practitioner and his client was therefore that the Applicant's property owning company was in trade (as a property investment and holding company and its business includes renting the property) and his actions, as sole director, were those of the company; and that if the vendor's version of events is correct, both of them would have engaged in conduct in relation to the deck that did mislead the vendor and which breached section 9; and that R is a person who has suffered loss because of that conduct.

[15] The Applicant obtained two legal opinions (provided to the Standards Committee) that he put forward to support the view that he had no liability to R. One of these asserted that the Applicant was not in a relationship with the vendor or R that would come within the ambit of the FTA. It then continued to assert that in any event

there was no conduct that could be considered misleading or deceptive. The second opinion asserted that to be liable there had to be some service provided to R, and that because there was not, then there was no liability. It seems both these opinions missed the import of the reference to section 43 FTA pleaded in the draft statement of claim and did not address the issue that it would seem the Applicant did not need to have been in a relationship with R for R to make the claim set out in the draft Statement of Claim.

[16] It seems to me the first matter the plaintiff in the FTA proceedings would have had to establish, regardless whether there was conduct that did in fact misled or deceive the vendor, is was such conduct in trade. "Trade" is broadly defined in the FTA, but for a contravention of section 9 the conduct must be "in trade". A discussion of the meaning of "in trade" can be found in *Gault on Commercial Law* (online loose leaf ed, Brookers) at [FT9.03]. The authors refer to a decision of the High Court of Australia (*Concrete Constructions (NSW) Ltd v Nelson* (1990) CLR 594, 604,606), which considered the meaning of "in trade or commerce" in the equivalent Australian legislation. The majority of the Court found that "…the mere driving of a truck or construction of a building is not, without more, trade or commerce and to engage in conduct in the course of those activities which is divorced from any relevant actual or potential trading or commercial relationship or dealing will not, of itself, constitute conduct 'in trade or commerce' for the purposes of that section". On the other hand, the minority argued that the phrase did not limit the operation of the section to "conduct which is in itself of a trading or commercial character. The question whether conduct is engaged in 'in trade or commerce' cannot be answered by reference to the conduct divorced from the circumstances in which it is engaged; it can be answered only by reference to the surrounding circumstances. Those are the circumstances 'in' which the conduct is engaged in … if misleading or deceptive conduct occurs in the course of carrying on an activity or carrying out a transaction of a trading or commercial character, the test imported by the phrase 'in trade or commerce' is satisfied".

[17] It may be then that the initial issue to have been resolved, if the proceedings had gone ahead, was whether the circumstances relating to the building of a deck by a company owning a rental property is 'in trade'. Was it divorced from any relevant actual or potential trading relationship or dealing? Or were the circumstances in which the conduct was engaged in, in the course carrying on an activity or carrying out a transaction of a trading character?

[18] I am satisfied, putting to one side what representations may have actually been made, the proposed FTA claim against the Applicant was arguable. The merits and strength of such a case and likelihood of success are debatable and it may be the Practitioner was 'drawing a long bow' in proposing the claim. However, the claim was tenable.

[19] If all that was required to comply with rule 2.3 in this case was that a tenable claim existed then that would be the end of the matter. However, this is not the case. The wording of rule 2.3 is important. It refers to "proper purposes", indicating that a lawyer could have more than one purpose for using legal processes. Thus, while the letter of 21 October may have been proper in relation to R's claim against the vendors, it is possible for it to have had a second purpose. If there was a second purpose and this was the predominant purpose then, if such purpose was improper, there would be a breach of rule 2.3.

[20] The Practitioner submitted that he was following his client's instructions in sending the [letter B] letter and the draft amended statement of claim, contending that he was not at liberty to disregard those instructions. He further submitted that in any event pursuing a barely tenable legal claim against a defendant could not of itself constitute a breach of Rule 2.3. However, lawyers have a responsibility, first as officers of the court and then as professional advisors to their clients, to ensure that legal processes are employed in a proper manner and for proper purposes. Acting on a client's instructions is not a complete answer to all and any action taken by a lawyer, nor can it can absolve a lawyer from improper use of legal processes.

[21] The whole circumstances of the relationship between the Applicant and the Practitioner's client is relevant in deciding whether there was another purpose and whether that purpose was improper in this particular case. Inevitably such questions will be difficult because the decision maker cannot know the actual state of mind of the parties. However, like a Court or Tribunal, I may properly draw reasonable inferences from proven facts. Accordingly, I may properly draw an inference of improper purpose, if on the facts and after weighing all evidence, it is reasonable to do so.

[22] I have in particular taken into consideration the following:

a. The history of the dispute between the Applicant and R over the deck.

b. That the Practitioner's client had unsuccessfully exhausted all legal means to prevent or restrict the building of the deck and had not been able to negotiate an agreement with the Applicant that satisfied him.

c. The tenability of the proposed FTA claim.

d. The disconnection between the deck and the FTA proceedings. The FTA action was for damages if a misrepresentation was established. (This point is also noted by the Applicant's lawyer in a letter to the Practitioner's client where he states that the FTA allegation "is not conducive to the outcome that you have indicated that you would like to achieve.")

e. The Applicant was never actually required to give evidence nor joined in the FTA action.

[23] I am satisfied on the basis of all of the evidence before me that the letter of 21 October 2008 was intended as an attempt to coerce the Applicant to compromise his position over the deck by means of the threat of legal action. I am further satisfied that this was the letter's predominant purpose. I find this purpose to be an improper use of a legal process and the use of the law or a legal process for the purpose of causing unnecessary distress or inconvenience to the Applicant's interests. This was a breach by the Practitioner of rule 2.3 of the Rules of Conduct and Client Care and constitutes 'unsatisfactory conduct' as defined by section 12 of the Lawyers and Conveyancers Act 2006.

Remedy

[24] I note that various orders of a penal and non-penal nature may be made under s 156 of the Lawyers and Conveyancers Act 2006. Those orders have the functions of improving the competence of practitioners, ensuring ongoing compliance with regulation, and providing redress to wronged parties. The Applicant particularly seeks an apology and compensation for legal expenses.

Compensation

[25] Section 156(1)(d) provides that an order for compensation may be made where it appears that any person has suffered loss by reason of any act or omission of a lawyer. For such an award to be appropriate it would be necessary for a causative link to be shown between the failure of the Practitioner and the losses suffered. In this case I am satisfied that the Applicant sought additional legal advice particularly to address the issues raised in the Practitioner's letter of 21 October and indeed the Practitioner suggested that the Applicant should seek advice. To the extent that the Applicant was obliged to seek legal services in relation to that letter, reimbursement of those fees is justified. The Applicant has provided invoices in relation to the opinion he obtained and related legal advice. The fees paid amount to $2,400. These appear to be reasonable in all of the circumstances. I accept these costs would not have been incurred but for the 21 October letter sent by the Practitioner, a letter which I have found was predominantly intended to persuade the Applicant to reduce the size of his deck. An order will be made for the Practitioner to reimburse the Applicant for this sum.

Apology

[26] The Applicant should receive an apology. I consider it appropriate that the Practitioner sends a letter of apology to the Applicant in relation to this matter, and an order will be made accordingly.

Censure

[27] It is proper to censure the Practitioner for this professional breach. The purpose of a censure is to set out the conduct as unacceptable and to reflect the condemnation of the conduct by the public and the profession. An order will be made accordingly.

Costs

[28] In general a lawyer in respect of whom orders have been made will be expected to meet a significant portion of the costs of the review. The Guidelines on Costs issued by this office state that in general for a case that is relatively straightforward and dealt with on the papers, a costs order of $900 would be made. In this case the matter involved some complexity. It is appropriate that the Practitioner contribute the sum of $1,000 towards the cost of the review. An order will be made accordingly.

Decision

[29] This application for review is upheld. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Wellington Standards Committee 2 is reversed.

Orders

[30] The following orders are made pursuant to section 156(1) of the Lawyers and Conveyancers Act 2006:

- The Practitioner is censured.
- The Practitioner is to send a letter of apology to the Applicant in a form that fairly reflects and acknowledges the finding made on this review. This should be sent to the Applicant within 30 days of this decision.
- The Practitioner is to compensate the Applicant for costs in the sum of $2,400. This payment is to be made to the Applicant within 30 days of the date of this decision.

The following order is made pursuant to section 201 of the Lawyers and Conveyancers Act 2006

- The Practitioner is to pay $1,000 in respect of the costs incurred in conducting this review. This shall be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 22nd day of June 2010

_____

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr Alloa as the Applicant
Mr Ullapool as the Respondent
The Wellington Standards Committee 2
The New Zealand Law Society